



1958

The Law of AWOL by Alfred Avins

Robert S. Pasley
Cornell University

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Pasley, Robert S. (1958) "The Law of AWOL by Alfred Avins," *Kentucky Law Journal*: Vol. 46 : Iss. 4 , Article 12.
Available at: <https://uknowledge.uky.edu/klj/vol46/iss4/12>

This Book Review is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Book Reviews

THE LAW OF AWOL. By Alfred Avins. New York: Oceana Publications 1957. Pp. xxi, 288. \$4.95.

For more than half a century, military law in the United States was identified with a single text, Winthrop's MILITARY LAW AND PRECEDENTS.¹ While other treatises existed, none approached its stature as a classic. Since enactment of the Uniform Code of Military Justice in 1950, there have been a number of newer books,² but only time will tell whether any will achieve the reputation of Winthrop. We are now witnessing a further development, the appearance of the specialized monograph on a single topic within the broader area of military justice. In this category falls the book under review: a detailed treatment of the law of absence without leave, the most common of all military offenses.³

When I first approached Mr. Avins' book, I was skeptical that a single military offense, even one of every day occurrence, warranted a book to itself. But since the author, now assistant instructor in law at Rutgers, had already made a mark for himself by a most interesting study of judicial review of state court martial proceedings,⁴ a paper which won honorable mention in a competition sponsored by the Institute of Military Law, I tempered my skepticism with hope. Having read Mr. Avins' book, I am willing to concede that there is room for a treatise on absence without leave, but I am afraid that the author has not given us the book which we might have hoped for from him.

But first for the book's undoubted merits. To begin with, it is certainly comprehensive. The author must have done a tremendous

¹ Winthrop, *Military Law* (1886); Winthrop, *Military Law and Precedents* (2 ed. 1896).

² E.g., Snedeker, *Military Justice Under the Uniform Code* (1953); Aycock and Wurfel, *Military Law Under the Uniform Code of Military Justice* (1955). Wiener, *The Uniform Code of Military Justice* (1950) is a section-by-section analysis of the 1950 Code and a comparison thereof with the 1948 Articles of War. *Military Jurisprudence* (Lawyers Co-op 1951), Schiller, *Military Law* (1952), and Walker, *Military Law* (1954) are essentially collections of cases and materials. Philos, *Handbook of Court-Martial Law* (Rev. ed. 1951) is primarily a digest.

For pungent comments on some of these, see Wiener, *The Teaching of Military Law in a University Law School*, 5 J. Legal Ed. 475 (1953).

³ Accounting, along with desertion, for about 50% of all general court-martial cases, and perhaps over 90% of all court-martial cases, general, special and summary. See statistics given at p. 34 of Mr. Avins' book.

⁴ Comment, *State Court Review of National Guard Courts-Martial and Military Board Decisions*, 41 Cornell L.Q. 457 (1956).

amount of research. His citations range in time from 1327⁵ to the present day, in space from the Straits Settlements⁶ around the world and back again to the South Pacific Theater of Operations during World War II.⁷ He discusses every aspect of absence without leave, detailing the elements which must be proved to establish the prosecution's case, and discussing every conceivable defense which might be raised on behalf of the accused.

For the most part, the author accepts the conclusions reached by prior experts in the field, by the Court of Military Appeals, by the service Boards of Review and by various civil courts. (It is surprising how often problems of military law have managed to come before the civil courts, despite the supposed immunity of court martial judgments from civilian judicial review). But where appropriate, Mr. Avins does not hesitate to express his disagreement with prior rulings. While I do not propose to go into all of these, or state to what extent I agree or disagree, one or two illustrations may be of interest.

Mr. Avins makes an impressive case against the rule that an accused is considered absent without leave during any period of detention by the civil authorities charged with a crime.⁸ The only exception recognized is the case where the accused is on leave at the time of his arrest and the civil proceedings result in his acquittal. So far has the rule been carried that the Navy Judge Advocate General has taken the position that even a dismissal of the charges by the civil authorities is not enough to exonerate the accused: nothing short of a full-fledged acquittal will suffice.⁹ Mr. Avins challenges the rule, arguing that since the accused is prevented by force from returning to military control, he should have available the defense of impossibility, provided that he has taken steps to notify the military authorities of his whereabouts. He claims that the early court martial rulings which passed upon the question did in fact take this position.¹⁰ The present rule seems to have been imported into the court martial area

⁵ P. 173, citing *De Chressey's Case*, Y.B. Mich. 1 Edw. 3, f. 25, pl. 24, *Jenkin's Reports* 7, 145 Eng. Rep. 6 (Ex. 1327) (Although it does not seem to me that this ancient case supports the defense of "relative impossibility," for which Mr. Avins apparently cites it, but rather holds precisely the opposite).

⁶ Pp. 52, 104, 216.

⁷ P. 202.

⁸ Pp. 150-62. See *Manual for Courts-Martial, United States*, 1951, par. 165, p. 316; *Snedeker, Military Justice Under the Uniform Code*, p. 563, sec. 2802 f (1953). A very recent holding affirming the currently accepted rule, and applying it to one adjudged a "youthful offender" in juvenile proceedings, is *United States v. Myrhe*, 9 U.S.C.M.A., 32, 25 C.M.R. 294 (1958).

⁹ CMO 12-1930, p. 15, discussed at pp. 156-57 of Mr. Avins' book.

¹⁰ Pp. 150-51. The authorities cited, however, are not very convincing, except by negative implication.

from cases involving civil suits for back pay,¹¹ where perhaps it has some justification.

Mr. Avins also takes up arms against the rule that an absence without leave cannot be constructively condoned, condonation being recognized as a defense only to a charge of desertion.¹² He argues that this rule is based upon a misreading of the precedents. At the time the early cases involving constructive condonation were decided,¹³ no distinction was drawn *administratively* between desertion and absence without leave. As a result, all condonations were administratively recorded as condonations of desertion, even though in many such cases, if there had been a trial, the actual court-martial offense would have amounted only to absence without leave. He concludes that historically there is no doubt that constructive condonation was available as a defense to a charge of absence without leave and that the present rule confining it to desertion cases cannot be supported.¹⁴

Mr. Avins does not hesitate to cross swords even with Winthrop, stating at one point that, in so far as Winthrop "is to the contrary" (*i.e.* of the proposition that to a charge of disobedience one may have the defense of mistake of authority), he is "not correct."¹⁵ A careful reading of the passage cited shows no real inconsistency, but only a more temperate and guarded statement by Winthrop that "a certain discretion in the execution of an order may sometimes be permitted to officers high in rank or command, or officers charged with expert or peculiarly responsible duties," a principle which Mr. Avins would convert into the rather sweeping defense of "mistake of fact on the part of authority."¹⁶ At another point Mr. Avins says that Winthrop's comment on a Maine militia case involving an allegedly unreasonable

¹¹ Dodge v. United States, 33 Ct. Cl. 28 (1897).

¹² Pp. 268-76. See Aycock and Wurfel, *Military Law Under the Uniform Code of Military Justice* 142 (1955). In *United States v. Minor*, 1 U.S.C.M.A. 497, 4 C.M.R. 89 (1952), the Court of Military Appeals was asked to extend the defense to absence without leave, but decided the case on other grounds, reserving the question for "further consideration x x x in an appropriate setting." Mr. Avins discusses this case at p. 271, but says that it "appears erroneous," probably referring to the Court's expression of doubt whether it could broaden the rule "without legislative sanction."

¹³ P. 270. Mr. Avins cites Winthrop, *Digest of Opinions of the Judge Advocates General of the Army, 1862-1895*, p. 140, No. 2 (1895), and Davis, *Military Law* 403 (2d ed. 1909), among other authorities to the effect that constructive condonation is available as a defense to a charge of absence without leave. He also cites Howland, *Digest of Opinions of the Judge Advocates General of the Army* (1912) p. 16, par. II B 7, digesting an 1863 case to the same effect.

¹⁴ Pp. 270-71.

¹⁵ P. 191, citing Winthrop, *Military Law and Precedents* 572 (1920 reprint of 2d ed. 1896).

¹⁶ Pp. 188-206.

order is "misleading and inadequate."¹⁷ There does not, however, appear to be any real difference between the author and Winthrop on the substantive point involved.

On the other hand, Mr. Avins accepts with equanimity some results which strike this reviewer as little more than logic chopping. In one case an accused who was absent without leave was arrested by German customs officials. Thinking that they had power to arrest him, he went with them. The Board of Review held that he was not guilty of an absence terminated by apprehension but only of the lesser offence of absence terminated by surrender, since in fact the arrest by the German authorities was unauthorized and the accused was presumed to know the law!¹⁸ As Mr. Avins says, this is one situation where the maxim that everyone is presumed to know the law benefited rather than hurt the accused.¹⁹

Even as forbidding a subject as military law has its lighter aspects. In recounting a case holding that it was no defense to an unauthorized absence for the accused to claim that his food disagreed with him,²⁰ the author adds the observation, reminiscent perhaps of a certain well-known old soldier: "If every person left his unit who was not fond of the food that was served, armies would soon fade away."²¹

In 1864 a Union commander, apparently of Copperhead sympathies, promised his soldiers leave on condition that they vote against President Lincoln.²² It is not surprising that this was ruled an illegal condition to attach to a grant of leave.²³

In 1787 an English naval court-martial tried Mr. Jerrard, first lieutenant of the *Scipo*, for disobedience of orders in that during the absence of the captain and contrary to orders, he not only granted leave but permitted women to come aboard. Although the court-martial dismissed him from the ship, it recommended him strongly to the Admiralty, partly because of his good service in the late war and also because the members did not think that he had acted out of a spirit of indiscipline but from kindness, adding that they could go no further with decency in an official document.²⁴

¹⁷ P. 239, citing Winthrop, *Military Law and Precedents* 576, n. 33 (1920 reprint of 2d ed. 1896), commenting on *State v. Woodman*, *Smith's Maine Militia Court Martial Decisions* 25 (3d Military Cir. 1828).

¹⁸ P. 140, citing *United States v. Mueller*, 17 C.M.R. 431 (1954).

¹⁹ *Ibid.*

²⁰ P. 146, citing *United States v. McIntyre*, 2 U.S.C.M.A. 559, 10 C.M.R. 57 (1953).

²¹ *Ibid.*

²² P. 245, citing Winthrop, *Digest of Opinions of the Judge Advocate General of the Army, 1862-1868*, p. 149, No. 11, Dec. 1864. (3d ed. 1868).

²³ *Ibid.*

²⁴ P. 282, citing Hannay, *Naval Courts Martial (1680-1816)* 56-57 (1914).

I come now to the less pleasant portion of this review, my criticisms. They are threefold: as to coverage, format, and style. Mr. Avins says that he has designed his book for "multi-purpose use," for the law student, the practicing attorney, the law course in a military service school, the military attorney, the ROTC student, and the non-lawyer in the service called on to administer some phase of military law.²⁵ I doubt whether any book, however excellent, could fill all these needs. But I do not see how a book limited to substantive law can possibly do so. The author sets forth in detail those matters which must be alleged and proved by the prosecution, and those matters which may be raised by the defense. But nowhere does he tell *how* this is done. Nowhere is there a copy of a charge sheet, a sample charge and specification, or any other reference to procedure. A more serious omission is the failure to discuss any of the problems of evidence. The beginning of an absence without leave is most often proved by offering a "duly authenticated extract copy of the morning report," as an exception to the hearsay rule.²⁶ But there are traps here, as many a lieutenant has discovered to his sorrow after his carefully tried special court-martial case has been "busted" on review because of the introduction of an improper morning report. In fact this is *the* legal problem, *par excellence*, which arises more often than any other in absence without leave cases.²⁷ Yet it is not mentioned by Mr. Avins.

The author says that "no special format" has been used, that in some places the book resembles a casebook, in others a textbook, in still others a law review article.²⁸ But the book does have a format, one which I find difficult and confusing. The text is repeatedly interrupted by excerpts from, or summaries of, some case, ruling, or text-book discussion. As a rule these are indicated only by a block-letter caption and a citation running across the page. Usually there is no introduction and often no explanation. At one place, I found it

²⁵ Preface, p. v.

²⁶ Manual for Courts-Martial, United States, 1951, pars. 144b, 144d, 164a; pp. 265, 268, 313; Aycock and Wurfel, *Military Law Under the Uniform Code of Military Justice* 257 (1955); *United States v. Masusock*, 1 U.S.C.M.A. 32, 1 C.M.R. 32 (1951).

²⁷ See, e.g., *United States v. Henry*, 7 U.S.C.M.A. 663, 23 C.M.R. 127 (1957); *United States v. Teal*, 3 U.S.C.M.A. 404, 12 C.M.R. 160 (1953); *United States v. Smith*, 2 U.S.C.M.A. 121, 6 C.M.R. 121 (1952); *United States v. Parlier*, 1 U.S.C.M.A. 433, 4 C.M.R. 25 (1952).

There has, however, been some relaxation in this area. It was formerly necessary that the entry in the morning report be based upon the personal knowledge of the officer making it. Manual for Courts-Martial, U.S. Army, 1928, par. 117 a, p. 121. It suffices now that the officer making the entry was under a duty to do so, and to ascertain the truth thereof. Manual for Courts-Martial, United States, 1951, par. 144b, d, pp. 266, 267; *United States v. Wilson*, 4 U.S.C.M.A. 3, 15 C.M.R. 3 (1954).

²⁸ Preface, p. v.

very difficult to tell where the excerpt ended and the text resumed.²⁹ Sometimes one cannot be sure whether the material is a direct quotation, a paraphrase, or a summary. It seems to me that this format, far from combining the best features of text, casebook, and article, is a throwback to earlier methods of legal writing which we have outgrown: the ancient "abridgment," in which case material and textual comment finally came to be inextricably interwoven and confused.³⁰

Finally, as to style. I realize that this can be a subjective matter, and that, like the gunner of the *HORNET* in the case cited by Mr. Avins,³¹ I may be "liable to be capricious at the full and change of the moon." But I do not think so. To me, sentences like the following are badly written:

Constructive communication, as a substitute for actual communication, is sufficient in AWOL cases, since the duty neglected is not so far greater in fault than failure to acquire the necessary knowledge as to make it fortuitous to punish the one fault for the other with the same penalty.³²

In addition, the above case does not answer the question of whom the order is to be palpably illegal to.³³

Not being an expert in the higher logic, I cannot determine the meaning of this:

Failure to establish either one of these factors fails to establish constructive communication.³⁴

Unfortunately, such examples are by no means rare.

I am old-fashioned enough to deplore jargon. I was willing to accept "AWOL" in the interest of saving space. But "AWOLism" grated on my nerves and "AWOLee" shattered them.

Nor are these solecisms confined to the mother tongue. We lawyers claim the privilege of mispronouncing Latin in our fashion, but none of us holds himself exempt from the rules of grammar. Last night, in Goldwin Smith Hall, I met the ghost of Professor Charles E. Bennett. He shook his head sadly and avowed that his life's work had been in

²⁹ P. 99-102.

³⁰ Among the best known abridgments were Fitzherbert (1516), Brooke (1574), Rolle (circa 1640), Bacon (1736), and Viner (1741-56). See Plucknett, *A Concise History of the Common Law* 273-76, 288-89 (5th ed. 1956); Winfield, *Abridgments of the Year Books*, 37 *Harv. L. Rev.* 214 (1923); Holdsworth, *Charles Viner and the Abridgments of English Law*, 39 *Law Q. Rev.* 17 (1923). Jenkins' *Eight Centuries of Reports* (1661) follows the same pattern: an abstract of a Year-Book case followed by comments of the editor, presented in such manner that the reader cannot tell which is the original report and which is Jenkins.

³¹ P. 145, citing Hannay, *Naval Courts Martial* (1680-1816) 64-65 (1914).

³² P. 102.

³³ P. 210.

³⁴ P. 103.

vain, when I told him that in Myron Taylor Hall we had a book which referred, not once, but 18 times, to the rule "*de minimus*."

A final protest to the publisher. I grow old, and my eyes are dim, so that I cannot see. As I gaze upon the pages of this book I say: "The words are Avins' words, but the print is the print of Oceana Publications; I discern it not, because their hand is chary of large type."

Robert S. Pasley
Professor of Law
The Cornell Law School
Ithaca, New York

THE BILL OF RIGHTS. By Learned Hand. Harv. Univ. Press, Cambridge, Mass., Pp. 77, 1958. THE RIGHT OF THE PEOPLE. By William O. Douglas. Doubleday & Co., Garden City, N.Y., Pp. 216, 1958.

Here are two excellent little books that must be read, and must be read together—their significance, in conventional legalese, is joint and not several. Here from two eminent members of the Federal Bench, are the briefs on either side of the argument over the ultimate meaning of the Bill of Rights. The effect of reading them as companion volumes is not to be convinced of the validity of one argument over the other, but rather to be struck by the importance of the problem—to be reminded again that the theoretical justification of the very foundation of our constitutional system is still the subject of sharply drawn controversy.

Judge Hand addresses himself to the "well worn"¹ problem of the proper scope of judicial review of legislation in matters relating to the First, Fourteenth and Fifth Amendments of the Constitution. Considering first the justification of the power of judicial review, Hand finds nothing in the text of the Constitution itself from which that power can be inferred.² From a short survey of the conditions that produced the Constitution and a briefer analysis of the needs of the government it created, Hand concludes that the power of judicial review was reasonably implied by the necessities of our triangular-structured government. Somewhere, he argues, there must reside power to finally arbitrate boundary disputes between the respective departments, and it is this function which the Court seemed best suited to fulfill.³ Sharply distinguished from this function, however, is that of question-

¹ Hand, *The Bill of Rights*, 1 (1958).

² *Id.* at 10.

³ *Id.* at 29.